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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BRET HOLIDAY,

Defendant and Appellant.

A154153

(San Francisco County  
Super. Ct. No. SCN228374.)

In February 2018, a jury found Bret Holiday guilty of four counts of felony possession of a controlled substance for sale and one count of misdemeanor possession of unlawful drug paraphernalia. These convictions stemmed from an October 2017 incident in the Tenderloin district of San Francisco, California, when police found Holiday in possession of a backpack containing substantial amounts of different controlled substances that were wrapped for street sale.

At trial, Holiday admitted he had been at a Tenderloin intersection that day holding the drugs for dealers selling them; however, he argued he lacked the specific intent required to be convicted of possession-for-sale. He based this argument on his own testimony that he was only holding for the dealers in exchange for drugs he and his girlfriend would use, he did not attempt to sell any drugs himself and he did not care whether the dealers sold any of their drugs. The prosecution countered that Holiday had the requisite intent as demonstrated by his knowing assistance to the dealers.

As part of its effort to prove its possession-for-sale charges, the prosecution contended Holiday used the same backpack in a previous incident in March 2017, when he was arrested and convicted of possession for sale of substantial amounts of controlled

substances at the same intersection of the Tenderloin. Before trial, the court issued an in limine ruling allowing the prosecution to introduce evidence about this March 2017 incident under Evidence Code section 1101, subdivision (b), but the court prohibited the prosecution from introducing any evidence that a BB gun was found at that time in Holiday's backpack. Holiday argues the trial court prejudicially violated his constitutional rights by reversing this in limine ruling in the middle of his trial testimony in order to let the prosecution ask him if he told police in March 2017 that a BB gun<sup>1</sup> was in the backpack. The People respond that the court, rather than reversing its in limine ruling, merely ruled properly that the prosecution could impeach Holiday with his prior statement to police *after* Holiday testified that he did not know the contents of the backpack in March 2017.

We need not address the merits of the constitutional issues raised by Holiday in this appeal or discuss at any length the People's right to impeach Holiday under the circumstances. Assuming for the sake of argument that the court made some error, it would have been harmless because of the overwhelming evidence of Holiday's guilt. Therefore, we affirm.

### **BACKGROUND**

In December 2017, the San Francisco County District Attorney filed an information that charged Holiday with one count each of possession of cocaine base for sale (Health & Saf. Code, § 11351.5); possession of heroin for sale (*id.*, § 11351); possession of cocaine salt for sale (*id.*, § 11351); possession of methamphetamine for sale (*id.*, § 11378); and possession of unlawful drug paraphernalia (*id.*, § 11364, subd. (a)). A contempt of a court order count was also alleged but dismissed before trial.

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<sup>1</sup> The gun was sometimes referred to as an "Airsoft gun" in the proceedings below. Because the jury heard it referred to as a "BB gun," we will use that description throughout this opinion for clarity's sake.

## I.

### ***The Court's In Limine Ruling Regarding Holiday's March 2017 Arrest***

Before trial, the prosecution moved in limine under Evidence Code section 1101, subdivision (b)<sup>2</sup> for the admission of evidence of Holiday's March 2017 arrest as probative of a common plan or scheme on his part to possess drugs for sale. The prosecution contended the March 2017 incident was very similar to the October 2017 incident because both involved Holiday's possession of a substantial amount of drugs wrapped for street sale, occurred at the same intersection in the Tenderloin and involved Holiday's possession of a black backpack. Defense counsel objected to the "problematic and prejudicial" fact that a BB gun was found in Holiday's backpack when he was arrested in March 2017.

The trial court ruled that the prosecution could under Evidence Code section 1101, subdivision (b) introduce evidence of the March 2017 arrest. It found the circumstances surrounding the March and October arrests "striking in their similarity" and that "they tend[ed] to rip up the proffered defense in this case which [was] that there [was] an innocent explanation for the possession of th[e] high quantity of a multitude of different controlled substances," rather than Holiday "possess[ing] the controlled substances for purposes of sale." The court found "as an alternative that the similarities between the two events [were] sufficiently similar to prove up that [Holiday] engaged in a common plan or scheme in possessing the controlled substances for sale in the same area, in the same manner, using the same modus operandi to sell the drugs." However, applying an Evidence Code section 352 analysis, the court prohibited the prosecution from introducing evidence of the BB gun found in Holiday's backpack during the March 2017 incident because the prejudice associated with this evidence was high, while its probative value was minimal regarding Holiday's intent in October 2017. Further, it excluded

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<sup>2</sup> Evidence Code section 1101, subdivision (a) bars the admission of character evidence. Evidence Code section 1101, subdivision (b) excepts from this bar evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act."

mention of the fact that the March 2017 arrest resulted in Holiday's conviction unless Holiday testified. However, the court said it would allow the prosecution to impeach Holiday with his criminal history if he chose to testify.

## II.

### *The Trial*

Evidence presented at trial indicates that at about 3:30 p.m. on October 22, 2017, Holiday encountered two San Francisco police officers while walking on Hyde Street near the corner of Golden Gate Avenue in the Tenderloin. He admitted to the police that he was in possession of drugs and the officers handcuffed and searched him. Police found a sock on Holiday's person containing what was determined to be heroin and cocaine base; in a small outside compartment of Holiday's backpack they also found 122 triple-wrapped bindles of heroin rocks weighing about 44.2 grams, 211 individually wrapped bindles of cocaine base weighing 44.2 grams (also known as crack cocaine), 14 individual bindles of cocaine salt (or powder) weighing 5.9 grams, and 22 individually wrapped twists of methamphetamine weighing about 7.9 grams. Holiday was not in possession of any of the "means of ingestion" for these drugs except that he was carrying a "four-inch clear glass pipe" that was "unique to the consumption of crack cocaine." The inside of the backpack was empty.

Officer Murray Daggs of the San Francisco Police Department testified that he arrested Holiday in March 2017, seven months before the incident that was the subject of the trial, near the corner of Hyde Street and Golden Gate Avenue in the Tenderloin. Daggs initially testified that Holiday had "[s]ome narcotics in a backpack." However, he then testified that he found the narcotics in Holiday's pants pocket. Holiday was in possession of 25.8 grams of heroin, 13.3 grams of methamphetamine, and 22.5 grams of cocaine base.

Testimony by the officers who arrested Holiday in October 2017, as well by an expert witness, indicated that Honduran men typically sold drugs on the west side of Hyde Street in the Tenderloin. These Hondurans uniquely sold triple-wrapped heroin, which could be swallowed without the drugs being ingested. Drug dealers working in the

area often used people, typically drug addicts, to hold most of their drugs. These holders did not sell the drugs themselves and were usually compensated with some of the drugs. They worked as a team with, and stayed in close proximity to, the dealer, who occasionally returned to the holder to obtain more drugs to sell.

Further, only street-level dealers packaged their drugs into small bindles, since users who can afford to buy more than three or four bindles at a time did not normally buy on the street. Street-level dealers packaged their drugs before transporting them to the street and did not carry scales. It was common for dealers to transport their drugs in socks from their homes, but they did not carry drugs in socks while they were selling on the street.

According to the expert, a person on the west side of Hyde Street near Golden Gate Street who is carrying 210 individually packaged bindles of cocaine base, 122 bindles of heroin, 22 bindles of methamphetamine, and 14 bindles of cocaine salt would possess the narcotics for the purpose of sale. The expert based his opinion on the quantity of drugs, their variety and the fact that the person was located in an area with a lot of drug trafficking. Also, people who only use and do not sell drugs do not carry hundreds of bindles, nor do they use heroin, cocaine base, cocaine powder, and methamphetamine at the same time.

Holiday testified on his own behalf. He said he was 44 years old and had lived in San Francisco since 2001 or 2002. Around the time he came to San Francisco, he began to use crack cocaine. In 2009, he was stabbed seven times while sleeping on the sidewalk in the Tenderloin. The stabbing caused injuries to his internal organs and nerve damage that caused ongoing severe pain. To cope with the pain, Holiday increased his consumption of crack to 10 to 15 rocks a day. He was homeless and made about \$25 a day collecting recycling.

Holiday said he had been holding drugs for street dealers daily for eight years. He was often compensated with crack cocaine, which he consumed, and sometimes heroin, which he gave to his girlfriend. He held drugs for various people.

According to Holiday, the morning of his arrest on October 22, 2017, he was introduced to a “Latin male” who was selling drugs that day. The man offered Holiday some “rocks” in exchange for holding a sock of drugs; the man went away but periodically returned to get drugs out of the sock. At about 3:00 p.m. that same day, “Jeff,” a “Latin” dealer for whom Holiday had for two years regularly held drugs, gave Holiday a backpack. Jeff would sell drugs Holiday held for him on the west side of the intersection of Hyde and Golden Gate. Occasionally during the day, Jeff would return to retrieve some more drugs from the backpack Holiday held for him and, when he did, he gave Holiday some crack cocaine to consume. Holiday understood he was to stay in the area with the backpack so that Jeff could find him. Holiday knew that Jeff was selling the drugs Holiday was holding for him. On the day of the October 2017 incident, Holiday understood there were drugs in the backpack Jeff gave to him, but he did not examine its contents.

Holiday further testified that he did not have any intent to sell the drugs he was holding that day. Asked if he had “any feelings one way or another regarding whether or not Jeff is successful in selling crack cocaine or any of the stuff that he gave you in the backpack,” Holiday testified, “No. Just as long as I get my rocks, I’m okay.” He further testified that his only designs or plans for the drugs in the sock was to “smoke.” He also said that if a dealer for whom he was holding was arrested, he would benefit because he would keep the drugs he was holding.

On cross-examination, the prosecution asked Holiday about the March 2017 incident.

“[Prosecutor]: Okay. You also had on your back on March—or, I’m sorry, on October 27th, 2017 [*sic*], a backpack, correct?”

“[Holiday]: Yes.

“[Prosecutor]: The same backpack you were wearing on March 30th; isn’t that correct?”

“[Holiday]: No.

“[Prosecutor]: These were different backpacks?”

“[Holiday]: Yes.

“[Prosecutor]: Okay. They’re both black; right?

“[Holiday]: Yes.

“[Prosecutor]: Okay. Who did the backpack belong to on March 30th, 2017?

“[Holiday]: A Latin male.

“[Prosecutor]: A Latin male on that day—

“[Holiday]: Mm-hmm.

“[Prosecutor]: —just let you hold the backpack without any drugs in it?

“[Defense Counsel]: Objection. That misstates the testimony.

“The Court: Overruled.

“[Holiday]: I didn’t know what was in the backpack on that day.

“By [Prosecutor]:

“You did not know what was in the backpack on that day?

“[Holiday]: No.

“[Prosecutor]: You had no idea that anything was in that backpack?”

The defense made another objection, which the court overruled. The prosecutor asserted that Holiday’s testimony “open[ed] the door to something.” The court held an off the record discussion with counsel and allowed the prosecutor to continue with the line of questioning. The prosecutor asked Holiday if he had “any knowledge of anything that was in the backpack that [he was] wearing,” and Holiday answered “No.” The prosecutor then asked Holiday if he remembered telling Officer Daggs, who had arrested him in March 2017, that he “had a BB gun in the backpack.” Holiday replied, “Yes.” Asked if he “knew what was in that backpack on that day,” Holiday answered, “Yes.”

Outside the presence of the jury, defense counsel further stated her reasons for objecting to the prosecution’s reference to the prosecution’s cross-examination, including its reference to the BB gun, because she had not questioned Holiday on these subjects on direct examination. The court said it allowed the cross-examination and impeachment because “just like any witness [Holiday] puts his credibility front and center in front of the jury. And barring some sort of in limine exclusion, for example, on criminal history,

it's fair game for the People to cross-examine [Holiday] vigorously on [his] past criminal conduct. And in this particular case I specifically ruled on the context of the in limines that I would allow evidence of [Evidence Code section] 1101[, subdivision] (b), his prior event of March 2017, as being highly probative on the question of Mr. Holiday's intent in October 2017 as well as common scheme or plan. . . . And, therefore, I do believe that questioning about this March 2017 event which was allowed as [Evidence Code section] 1101[, subdivision] (b) evidence was permissible to test his credibility as to his intent on October 2017 as well as common scheme or plan." The court thought the defense was on notice because of Officer Daggs's testimony and the in limine discussion that the March 2017 event was a potential area of cross-examination for Holiday.

The following day, the defense moved for a mistrial or to strike Holiday's testimony in cross-examination about the March 2017 incident. Defense counsel's argument included that Holiday only denied knowledge of what was in the backpack in March 2017 because she had instructed him not to discuss the backpack and its contents. She further argued that evidence about the backpack and its content was not relevant to the issue at hand and that the prosecutor had improperly "open[ed] her own door" in order to impeach Holiday's credibility, even though she had not asked Holiday about his March 2017 arrest on direct.

The court denied the defense motions. It determined that a "curative instruction [would be] overbroad" because the March 2017 and October 2017 incidents were sufficiently similar in terms of location and specific details. It concluded that Holiday "opened the door himself" because he "made a very broad assertion that he was not in any way obligated to make" about not knowing the contents of the backpack; the prosecution had not "kicked open the door" and it was "entitled to impeach" Holiday with his prior inconsistent statement to Officer Daggs that a BB gun was in the backpack. Therefore, the court concluded, the prosecution had not violated the court's in limine ruling.



### III.

#### *The Verdict and Sentence*

The jury found Holiday guilty of all four drug possession-for-sale charges and of the possession of drug paraphernalia charge. The trial court sentenced Holiday to three years in county jail with credit for time served. Holiday filed a timely notice of appeal.

### DISCUSSION

#### I.

#### *Holiday's Claim of Error*

Holiday argues the trial court, by reversing its in limine ruling in the middle of his testimony, violated his Fifth Amendment right against self-incrimination, Fourteenth Amendment right to due process and Sixth Amendment right to present a defense.

It is unnecessary for us to decide the merits of Holiday's claim or the People's response in light of our conclusion, discussed in the next section, that any error was harmless. We note only that, as the People assert, generally defendants who choose to testify in their own defense have an obligation to "speak truthfully and accurately." (*Harris v. New York* (1971) 401 U.S. 222, 225.) Should a defendant fail to live up to this obligation, the government may use the defendant's prior inconsistent statements to demonstrate he or she has breached this obligation. (*Ibid.*) While the prosecution is prohibited from building its case against a criminal defendant on evidence that is acquired through the "contravention of constitutional guarantees and their corresponding judicially created protections," use of statements obtained in such a manner for impeachment purposes *is* permitted. (*Michigan v. Harvey* (1990), 494 U.S. 344, 350–351.) "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately.' " (*Id.* at p. 351.) Thus, the Supreme Court has "consistently rejected arguments that would allow a defendant to "turn the illegal method by which evidence

in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." ' ' ' (Ibid.)

Holiday posits no reasoned arguments pertaining to the validity of the prosecution's impeachment efforts, instead focusing almost entirely on asserting his constitutional rights. Indeed, he has not even filed a reply brief to address the People's impeachment arguments.

## II.

### *Any Error Was Harmless.*

Even if we assume for the sake of argument that the court erred by allowing the People to impeach Holiday with his prior statement to Officer Daggs about the BB gun, we conclude the error was harmless because of the overwhelming evidence of Holiday's guilt, whether we apply the state or federal standard of review for error. (See *People v. Watson* (1956) 46 Cal.2d 818, 837 [state]; *Chapman v. California* (1966) 386 U.S. 18, 24 [federal].)

The prosecution briefly mentioned that Holiday told Daggs he had a BB gun in his backpack upon his arrest in March 2017 and it was never mentioned again. This brief reference was of little significance to Holiday's intent to hold drugs for sale by dealers seven months later (see *People v. Lopez* (2013) 56 Cal.4th 1028, 1064–1065 [any error was harmless under any standard of prejudice in part because the challenged testimony was brief and the prosecutor did not emphasize it in closing argument], abrogated in part on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1191, 1216), particularly in light of the overwhelming evidence of Holiday's guilt. This evidence includes that in October 2017 police found substantial amounts of different drugs in Holiday's possession wrapped in hundreds of bindles and twists—methods of wrapping used by street-level dealers. Further, Holiday admitted at trial that he was holding the drugs for two people he understood were selling these drugs on the streets of the Tenderloin, that he expected to be given some drugs for his efforts and that he was not a user of most of the types of drugs he was holding. In other words, he in effect freely admitted assisting two people sell drugs in return for drugs.

Holiday's only defense was that he did not intend to sell any of the drugs himself and he did not care whether the dealers sold any of the drugs. That this somehow shows he did not have the intent required to be convicted of possession-for-sale is completely unpersuasive. Possession for sale includes when a defendant " 'possess[es] the specific intent that someone else will sell the controlled substance.' " (*People v. Ramos* (2016) 244 Cal.App.4th 99, 105; see *People v. Perez* (2005) 35 Cal.4th 1219, 1231 [citing appellate courts that have interpreted Health and Safety Code section 11351 (one of the statutes Holiday was charged under) "as extending to those who possess controlled substances with the intent that someone else sell them"].) Holiday freely admitted he held the drugs in order to help two drug dealers sell them; what he might have felt in his heart of hearts about the ultimate success of their efforts to do so does not alter this admitted intent to assist them. That he possessed a BB gun seven months before when he was arrested at the same location with similar drugs in his possession was insignificant in the face of this overwhelming evidence of his guilt in October 2017.

Holiday asserts that the "[t]here are indications in the record that some of the jurors harbored doubts about their guilty verdicts" based on two items in the record. First, he contends that "it was noted on the record that several jurors hesitated in responding when polled for their verdict." This is unpersuasive because it was *defense counsel* who stated her perception of hesitations by two jurors and the trial court promptly disagreed, concluding that nothing could be inferred from hesitations on some, but not all, of the five counts other than "a couple of [jurors] perhaps not being all that attentive when their numbers were being called out."

Holiday also points to a postverdict letter from a juror that was used as evidence in mitigation at his sentencing. Assuming for sake of argument that we may rely on such a letter to analyze the effect of error here (but see *People v. Lindberg* (2008) 45 Cal.4th 1, 52–53 [court precluded from considering jurors' postverdict letter that discussed the jurors' mental processes], quoting *People v. Morris* (1991) 53 Cal.3d 152, 231 [" '[A] verdict may not be impeached by inquiry into the juror's mental or subjective reasoning processes, and evidence of what the juror "felt" . . . is not competent' "], disapproved in

part on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1; *Fernandez v. Consolidated Fisheries, Inc.* (1953) 117 Cal.App.2d 254, 263 [“[A]ffidavits of jurors may not be used to impeach or to interpret the verdict”]), in her letter the juror did not challenge the strength of the evidence against Holiday. Rather she referred to her and possibly other jurors’ policy concerns about the penal consequences for drug offenders, including imprisonment. Her letter does nothing to show that exclusion of the BB gun evidence would have altered the verdict.

#### **DISPOSITION**

The judgment is affirmed.

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STEWART, J.

We concur.

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KLINE, P.J.

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MILLER, J.

*People v. Holiday* (A154153)